IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MICHAEL C. PICK, on behalf of himself and all other persons similarly situated,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-935-SLR
DISCOVER FINANCIAL SERVICES, INC.,	)	
Defendant.	)	

Jeffrey S. Goddess, Esquire of Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Delaware. Counsel for Plaintiff. Of Counsel: Lester L. Levy, Esquire and Catherine E. Anderson, Esquire of Wolf Popper LLP, New York, New York.

David A. Jenkins, Esquire of Smith, Katzenstein & Furlow, LLP, Wilmington, Delaware. Counsel for Defendant. Of Counsel: William H. Pratt, Esquire and Eric F. Leon, Esquire of Kirkland & Ellis, New York, New York. Alan S. Kaplinsky, Esquire and Mark J. Levin, Esquire of Ballard Spahr Andrews & Ingersoll, LLP, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: September 28, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Michael C. Pick filed this action on behalf of himself and a putative class of Discover cardholders on November 7, 2000 against defendant Discover Financial Services, Inc. Plaintiff alleges violation of the Truth in Lending Act, 15 U.S.C. § 1601, et seq., consumer fraud and breach of contract arising out of defendant's amendment to the terms of the Discover Cardmember Agreement. (D.I. 1) Currently before the court are defendant's motions to compel arbitration and to stay the proceedings pending completion of the arbitration. (D.I. 4) For the following reasons, the court shall grant defendant's motion to compel arbitration and dismiss the action, and deny defendant's motion to stay as moot.

II. BACKGROUND

In March 1999, plaintiff applied for a Discover Platinum Card (the "Card") issued by defendant. Plaintiff's application was approved, and defendant mailed plaintiff the Card with a "Pricing Schedule" stating that the Fixed Annual Percentage Rate ("Fixed APR") for purchases was 12.99%.[1] (D.I. 10, Ex. A)

[1]The Pricing Schedule, described as "part of the Discover Platinum Cardmember Agreement," contained a column that listed expiration dates for the various rates. The expiration date for the Fixed APR for purchases was left blank. (D.I. 10, Ex. A)

Defendant also included a copy of the Discover Cardmember Agreement (the "Agreement")[2], which provided the following terms:

> **CHANGE OF TERMS: We may change any term or part of this Agreement, including any finance charge rate, fee or method of computing any balance upon which the finance charge rate is assessed, or add any new term or part to this Agreement by sending you a written notice at least 15 days before the change is to become effective. We may apply any such change to the outstanding balance of your Account on the effective date of the change and to new charges made after that date. If you do not agree to the change, you must notify us in writing within 15 days after the mailing of the notice of change at the address provided in the notice of change, in which case your Account will be closed and you must pay us the balance that you owe us under the existing terms of the unchanged Agreement. Otherwise, you will have agreed to the changes in the notice. Use of your Account after the effective date of the change will be deemed acceptance of the new terms as of such effective date, even if you previously notified us that you did not agree to the change.**

(D.I. 10, Ex. A at 9) (emphasis in original)

Pursuant to the above provision, each time defendant changed the Agreement, defendant sent a written "Notice of Amendment" to its cardholders that documented the details of the new terms and conditions. Effective for billing periods beginning after September 1, 1999, defendant changed the method of calculating periodic finance charges and the payment due date, and added an arbitration section to the Agreement. The "Terms Level 11"

---

[2]Each time defendant changes the terms and conditions of the Agreement, it is given a new "Terms Level" number. When plaintiff opened his account, the Agreement in effect was known as "Terms Level 10." (D.I. 6 at 2)

Notice of Amendment, mailed to existing Discover cardholders with their monthly bills from July 1999 to August 1999,[3] stated:

> This notice informs you of changes to your current Discover Platinum Cardmember Agreement. Please note the effective date of the changes shown below and retain this notice for your records. **WE ARE ADDING A NEW ARBITRATION SECTION WHICH PROVIDES THAT IN THE EVENT YOU OR WE ELECT TO RESOLVE ANY CLAIM OR DISPUTE BETWEEN US BY ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. THIS ARBITRATION SECTION WILL NOT APPLY TO LAWSUITS FILED BEFORE THE EFFECTIVE DATE.** We are also changing the way we calculate Periodic Finance Charges. These changes do not apply if your Account is closed at the time you receive this notice.

(D.I. 6) (emphasis in original)

The "Arbitration Section" provided:

> **ARBITRATION OF DISPUTES.** In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this

---

[3]Defendant implemented several quality control measures to ensure that the Terms Level 11 Notice of Amendment was delivered to existing cardholders, including: (1) monitoring insertion of the Notice of Amendment into monthly billing statements; (2) random auditing of statements to ensure correct insertion of the Notice of Amendment; (3) mailings to various Discover Financial Services employees to validate insertion and receipt; and (4) reconciliation of notifications against a list of eligible cardholders to ensure that every cardholder received a Notice of Amendment. (D.I. 6 at 6) Defendant claims that a Terms Level 11 Notice of Amendment was inserted in plaintiff's July 20, 1999 monthly statement, which was mailed via the United States Postal Service and never returned as undeliverable, although plaintiff alleges that he never received it. (Id.) In August 1999, plaintiff made payment on the charges listed in his July 20, 1999 statement. (Id.)

arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.

IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit, and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision.

. . .

Your Account involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act (FAA). The arbitration shall be conducted, at the option of whoever files the arbitration claim, by either JAMS/Endispute (JAMS) or the National Arbitration Forum (NAF) in accordance with their procedures in effect when the claim is filed. . . . At your written request, we will advance any arbitration filing, administrative and hearing fees which you would be required to pay to pursue a claim or dispute as a result of our electing to arbitrate that claim or dispute. The arbitrator will decide who will ultimately be responsible for paying those fees. In no event will you be required to reimburse us for any arbitration filing, administrative, or hearing fees in an amount greater than what your and our combined court costs would have been if the claim had been resolved in a state court with jurisdiction.

. . .

Any arbitration hearing will take place in the federal judicial district where you reside.

. . .

Effective Date. If you do not agree to the changes, you must notify us in writing by *September 15, 1999,* at the following address: Discover Card, P.O. Box 15355, Wilmington, DE 19850-5355. If you notify us, we will close your Account and you will pay us the balance that you owe us under the current terms of the Agreement. If you do not

> notify us, the changes set forth in this notice will be effective and will apply to your Account for billing periods beginning after *September 1, 1999*. Use of your Account on or after October 1, 1999, means that you accept the new terms, even if you previously notified us that you did not agree to the changes.

(D.I. 6) (emphasis in original)

Plaintiff did not notify defendant by September 15, 1999 that he disagreed with the Notice of Amendment, and continued to use his Card after October 1, 1999. (D.I. 6 at 7)

Plaintiff allegedly first noticed a change in terms upon receipt of his July 20, 2000 statement, which stated a Fixed APR for purchases of 15.49%. (D.I. 10 at 2) Plaintiff did not pay that balance in full. (Id.) Plaintiff then realized that the Fixed APR for purchases on his June 20, 2000 statement was 14.99%, although he timely paid that balance in full. (Id.) On August 26, 2000, plaintiff sent defendant a letter requesting copies of the written notifications that he should have received prior to the increases in rates. (Id., Ex. B) On October 30, 2000, in response to plaintiff's letter, defendant sent plaintiff a copy of the amended Agreement.[4] (Id., Ex. D)

[4]Pursuant to the Agreement, defendant must respond to plaintiff's letter within thirty days, and correct any billing error or explain why the bill was correct within ninety days. (D.I. 10, Ex. A) Plaintiff notes that defendant fulfilled neither of these obligations.

III. DISCUSSION

The Federal Arbitration Act ("FAA") provides that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA mandates that district courts shall direct parties to proceed to arbitration on issues for which arbitration has been agreed, and to stay proceedings while the arbitration is pending. See 9 U.S.C. §§ 3, 4; Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985); Harris v. Green Tree Financial Corp., 183 F.3d 173, 179-80 (3d Cir. 1999) ("If . . . a court deems a controverted arbitration clause a valid and enforceable agreement, it must refer questions regarding the enforceability of the terms of the underlying contract to an arbitrator, pursuant to section four of the FAA."); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 228 (3d Cir. 1997) ("In conducting this inquiry the district court decides only whether there was an agreement to arbitrate, and if so, whether the agreement is valid."). The FAA requires the court to look to the principles of contract law to determine if arbitration clauses are valid and enforceable. See 9 U.S.C. § 2. In construing the scope of an arbitration clause, courts generally operate under a pronounced "presumption of arbitrability." Battaglia v. McKendry, 233 F.3d 720, 725 (3d Cir. 2000) (quoting AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 650 (1986)).

A. Delaware Consumer Fraud Act Claim Is Subject to Arbitration

Plaintiff argues that his claim under the Delaware Consumer Fraud Act is not subject to arbitration because it alleges fraudulent inducement and false advertising by defendant. Under the Supremacy Clause, the federal substantive law created by Section 2 of the FAA preempts state law. See Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). Moreover, the Supreme Court has stated that allegations of fraudulent inducement and false advertising, because they pertain to the entire contract and not just the arbitration clause, are properly addressed by an arbitrator.[5] See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) ("[I]f the claim is fraud in the inducement of the arbitration clause itself — an issue which goes to the 'making' of the agreement to arbitrate — the federal court may proceed to adjudicate it. But the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally."). Thus, the court concludes that plaintiff's Delaware Consumer Fraud Act claim is subject to arbitration. See, e.g., Sagal v. First USA

[5]Similarly, plaintiff's arguments that defendant breached the Agreement by not responding to his letter within thirty days and not correcting his bill within ninety days stem from the underlying contract and not the arbitration clause. Consequently, they are properly addressed by an arbitrator rather than the court.

Bank, N.A., 69 F. Supp.2d 627, 632 (D. Del. 1999), aff'd, 254 F.3d 1078 (3d Cir. 2001).

B. Plaintiff Received Adequate Notice of Arbitration Section

To amend credit card agreements regarding changing interest rates, banks are required under Delaware law to follow certain procedures. See 5 Del. C. § 952(b)(1)-(2). These procedures provide for a notice to the cardholder of the proposed amendment, and opting out by sending notice to the bank of the rejection of the amendment. See id. Defendant claims that it sent notice a Terms 11 Notice of Amendment to plaintiff in his July 20, 1999 monthly statement, in accordance with Delaware law and defendant's business practice of ensuring complete delivery to all of its cardholders. Although plaintiff claims that he never received the Notice of Amendment, defendant's mailing procedures and plaintiff's payment of his July 20, 1999 bill are sufficient evidence to satisfy defendant's burden of demonstrating adequate notice to plaintiff. See Marsh v. First USA Bank, 103 F. Supp.2d 909, 918 (N.D. Tex. 2000) (applying Delaware law); Edelist v. MBNA Am. Bank, No. 01C-01-195-JOH, 2001 WL 946500, at *3 (Del. Super. Aug. 9, 2001); Grasso v. First USA Bank, 713 A.2d 304, 310 (Del. Super. 1998). Thus, the court finds that defendant adequately notified plaintiff of the Arbitration Section.

C. Arbitration Section Is Valid and Enforceable

Plaintiff also claims that even if he received adequate notice of the Arbitration Section, it is nevertheless invalid and unenforceable because it provides him no real choice to reject the Agreement, is the product of unequal bargaining power, lacks mutuality of remedy and prevents aggregation of class-wide claims.

Delaware law expressly permits banks to amend credit card agreements to add arbitration clauses:

> Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect, whether or not the amendment or the subject of the amendment was originally contemplated or addressed by the parties or is integral to the relationship between the parties. Without limiting the foregoing, such amendment may change terms by the addition of new terms or by the deletion or modification of existing terms, whether relating to . . . arbitration or other alternative dispute resolution mechanisms.

5 Del. C. § 952(a). Furthermore, Delaware provides for an opt-out procedure that allows credit cardholders to reject any change in terms simply by providing written notice to the bank before the change goes into effect:

> Any amendment that increases the rate or rates of periodic interest . . . may become effective as to a particular borrower if the borrower does not, within 15 days of the earlier of the mailing or delivery of the written notice of the amendment . . . furnish written notice to the bank that the borrower does not agree to accept such amendment.
> . . .

> Any borrower who furnished timely notice electing not to accept an amendment in accordance with the procedures [above] . . . shall be permitted to pay the outstanding unpaid indebtedness in such borrower's account under the plan . . . [and] the bank may convert the borrower's account to a closed end credit account.

5 Del. C. § 952(b)(2), (b)(5).

Courts have routinely upheld Delaware's statutory scheme of permitting banks to unilaterally amend agreements with opt-out availability. Edelist, No. 01C-01-195-JOH, 2001 WL 946500, at *7; Marsh, 103 F. Supp.2d at 929. Furthermore, more than a disparity in bargaining power is needed to show that an arbitration clause is unconscionable or unenforceable. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991); Harris, 183 F.3d at 182-83. Thus, the court concludes that the Arbitration Section is not invalid because it lacks meaningful choice and is created with unequal bargaining power.

Moreover, mutuality is not a requirement of a valid arbitration clause, provided that the underlying contract is supported by consideration. See Harris, 183 F.3d at 180. The court finds that the Agreement, pursuant to which plaintiff received the benefits of the Card and defendant gained plaintiff's subscription, is supported by adequate consideration. Therefore, no mutuality is necessary to ensure validity of the Arbitration Section.

Finally, it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions. See

Gilmer, 500 U.S. at 32 (ADEA claims); Johnson v. West Suburban Bank, 225 F.3d 366, 377 (3d Cir. 2000), cert. denied, 69 U.S.L.W. 3383 (U.S. Feb. 20, 2001) (No. 00-846) (Truth in Lending Act claims). Thus, plaintiff's argument that the Arbitration Section is invalid because it deprives him of the right to class-action relief is unavailing.

D. The Action Should Be Dismissed

The FAA provides that courts shall enter a stay pending arbitration when issues brought before the courts are subject to arbitration clauses. See 9 U.S.C. § 3. Courts have interpreted the provision, however, to permit dismissal if all issues raised in an action are arbitrable and must be submitted to arbitration. See Sagal, 69 F. Supp.2d at 632; Pelegrin v. U.S. Filter, No. 97-390-SLR, 1998 WL 175880, at *4 (D. Del. Mar. 31, 1998); Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 638 (9th Cir. 1988); Hoffman v. Fid. & Deposit Co., 734 F. Supp. 192, 195 (D.N.J. 1990). Since plaintiff's claims must be submitted to arbitration, the court concludes that this action should be dismissed. The court will not retain jurisdiction pending the completion of arbitration.

IV. CONCLUSION

For the reasons stated, defendant's motion to compel arbitration is granted and the action is dismissed. Defendant's

motion to stay proceedings pending completion of arbitration is denied as moot.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

MICHAEL C. PICK, on behalf of himself and all other persons similarly situated,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-935-SLR
DISCOVER FINANCIAL SERVICES, INC.,	)	
Defendant.	)	

O R D E R

At Wilmington, this 28th day of September, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that defendant's motion to compel arbitration (D.I. 4-1) is granted and the action is dismissed. Plaintiff's motion to stay (D.I. 4-2) is denied as moot.

_____
United States District Judge